PROPOSED REMEDIES IN COURT PROCEDURE.

IT is the judgment of the writer that the chief function of the legislature is to declare substantive rights. Court procedure being but the machinery by which substantive rights are determined, the responsibility for the effectiveness of that machinery should rest alone upon the courts. Unnecessary prolixity and confusion too frequently result from the present two-fold source of procedural law.

Delays cannot be avoided, and the courts are altogether too often compelled to dismiss legal proceedings because they do not conform to some statutory requirement. This might be equally true if court rules were substituted for statutory provisions; but if there is any ground for the general complaint of delays in legal proceedings, the responsibility for those delays, if any, should be fixed either upon the courts or upon the legislature, one or the other. If the responsibility is with the legislature, the remedy would be at once apparent and could be reached. The same is true if the responsibility rested upon the courts alone. But I submit that while the responsibility rests upon both the legislature and the courts, there can be no adequate remedy.

The responsibility should, clearly, rest upon the courts. They alone should provide the means of enforcing substantive rights. The object of all court procedure should be to speedily reach and determine the merits of each case. To this end, courts should be given, and when given should assume, authority, within constitutional limitations, to do or to require to be done any act necessary in the interests of justice and the speedy determination of every case tried before them. Any other purpose,—namely, either to delay or defeat justice—ought not to be made possible by our procedure. Yet it is often used to that end.

The legislature, meeting biennially, with its multitude of duties to perform and the review of thousands of bills, good and bad, presented for consideration at each session, is inherently not the logical body to consider, coherently and as a unit, the problem of procedure. Each session brings forth its quota of procedural law; but these acts are too frequently fitful, unrelated, and oftentimes only the expression of some individual, though influential, member to fit some existing case in which he may be personally interested.

The many different ways in which personal service may be obtained, the incongruities of our garnishee statutes, the various methods of condemning land, the varying modes of procedure relating to corporations, and many other instances that might be cited, show

the loose way in which the legislative rules of procedure are formed. Duplication, contradictions, inconsistencies, prolixity, are the rule, and, when combined, destroy both unity and continuity. This has been the result in the past, and must necessarily be the result in the future, of legislative attempt to cope with the problem of procedural law.

The difficulties encountered in the several code states, as well as in our own state, result, and have resulted, from this two-fold source of procedural law—the court and the legislature.

The legislature, I repeat, should declare only substantive rights, and the matter of procedure should be left alone to the courts, to be regulated by rules instead of by statutes. This has successfully been accomplished in England under the Judicature Act of 1873, and in her several colonies where that act has been adopted and followed.[1] It is also one of the fundamental principles of the recent New Jersey code. In Michigan, a so-called common law State, we still have this two-fold source of procedure, although we early started upon the other plan.

At the time of the adoption of the Constitution of 1850, influenced largely by the change which had so recently taken place in New York in 1848 and the changes that were rapidly being made in other states from common law to code procedure, unsuccessful efforts were made to bring Michigan in line with the prevailing reforms. A compromise was reached in the Constitutional Convention of that year, which was expressed in the following clause:

> "The supreme court shall, by general rules, establish, modify and amend the practice in such court and in the circuit courts, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.[2]

The office of chancellor had already been abolished by the legislature.[3]

In conformity with the Constitutional authority thus given the Supreme Court to regulate the practice of the courts in this State, and as an early interpretation of the extent and scope of that authority by the legislature itself, the legislature passed an act providing as follows:

> "The judges of the supreme court shall have power, and it shall be their duty within three months after this law shall

[1] For a discussion of this Act with some reference to its applicability to our own procedure, see 12 Mich. Law Rev. 277-292 (Feb. 1914).

[2] Constitution of 1850, § 5, Art. 6.

[3] Rev. Stat. 1846, ch. 90.

take effect, by general rules to establish, and from time to time thereafter to modify and amend, the practice in said court and in the circuit courts, at law and in equity, in cases not provided for by any statute; and they shall once at least in every two years thereafter, if necessary, revise the said rules with the view to the attainment so far as may be practicable of the following improvements in the practice:

"1. The abolishing of distinctions between law and equity proceedings, as far as practicable;

"2. The abolishing of all fictions and unnecessary process and proceedings;

"3. The simplifying and abbreviating of the pleadings and proceedings;

"4. The expediting of the decisions of causes;

"5. The regulation of costs;

"6. The remedying of such abuses and imperfections as may be found to exist in the practice;

"7. The abolishing of all unnecessary forms and technicalities in pleading and practice.

"8. To effectually prevent the defeat or abatement of any civil suit, ex contractu, for either any nonjoinder or misjoinder of parties where the same can be done consistently with justice;

"9. To provide for all necessary amendments of process, pleadings, or other proceedings in such case; and,

"10. To provide the manner in which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court."[4]

The Supreme Court was also given power to compel discovery of books, papers, and other documents, to stay proceedings therein, and to make rules in relation thereto; to prescribe the practice in certain cases, and to prescribe rules relative to the practice in Circuit Courts.[5]

But more than this, and again anticipating by sixteen years the Judicature Act of England of 1873, which contains a similar provision, the Supreme Court was thus early given authority to require oral testimony to be given in that court in the furtherance of justice, as follows:

[4] Compiled Laws 1857, § 3390; Compiled Laws 1897, § 196.

[5] Compiled Laws 1857, §§ 3391-3400; Compiled Laws 1897, §§ 197-206.

"The Supreme Court may at any time in accordance with, and for the speedy furtherance of, justice in any suit, either at law or in equity, call upon the parties to such suit, or any witnesses thereto, to testify orally in open court; and said court may by rule provide for a similar practice in the Circuit Courts. But no party or witness whose evidence may not be received under the Statutes of the State, shall be called upon to testify under the provisions of this section."[6]

It is also given authority to prescribe all forms and proceedings in chancery, as follows:

"The supreme court shall have power from time to time by general rules of court to establish, alter, modify, or amend the practice of the circuit courts in chancery, in the cases not provided for by statute; and said court shall, as often as it may be necessary, revise the rules of the said court with a view to the attainment, as far as practicable, of the following improvements in the practice:

"1. The abbreviating of bills, answers, and other proceedings.

"2. The expediting of the decisions of causes.

"3. The diminishing of costs.

"4. The remedying of such abuses and imperfections as may be found to exist in the practice in all cases or suits cognizable in chancery; and,

"5. The abolishing of all unnecessary forms and technicalities in the proceedings and practice of said courts."[7]

There are various other enumerated subjects wherein the Supreme Court is given power to prescribe rules.[8]

These several acts stand unamended to this day.

And in further confirmation of the authority thus given to the Supreme Court, the new Constitution of 1909 contains a substantial repetition of the clause in the Constitution of 1850, reading as follows:

"The Supreme Court shall by general rules establish, modify, and amend the practice in such court and in all other courts of record, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of Master in Chancery is prohibited."[9]

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[6] Compiled Laws 1857, § 3405; Compiled Laws 1897, § 211.

[7] Compiled Laws 1857, § 3487; Compiled Laws 1897, § 445.

[8] Compiled Laws 1897, §§ 919, 921, 9988-9, 10221, 10245, 10259, 10263.

[9] Constitution of 1909, § 5, Art. 7.

It is scarcely necessary to say that the provisions in the Constitution of 1850 and the legislative enactments following it contain, in substance, the arguments of the code reformers of that day. But instead of adopting these arguments and incorporating them into a new system of practice at once by legislative enactments, as other states had done and were doing, Michigan took the wiser and more conservative course by turning the whole matter of reform in procedure over to the Supreme Court as the most competent body in the State to perform so delicate a task. In this both the Constitutional Convention of 1850 and the several legislatures following it were right, and anticipated the English Judicature Act of 1873 by over twenty years, and the New Jersey Act of 1912, as well as the present widespread conviction on the part of many serious-minded people that rules of court procedure should emanate from the court alone, by a period of over sixty years. It is undoubtedly by reason of these early provisions of our law that the practice in Michigan has been so remarkably free from popular as well as professional criticism during these years.

Progress, however, has been very slow and gradual. New rules of court have been adopted from time to time, and in 1899 the entire set of rules was completely revised. This revision was accomplished in the first instance by a committee appointed by the State Bar Association. The work of this committee was very thorough and satisfactory to both the bench and the bar, and, after its approval by the Bar Association, was adopted without change by the Supreme Court June 28, 1899, going into effect September 1, 1899. Mr. Frederick W. STEVENS, a member of the committee on revision of the Bar Association, afterwards annotated these new rules and the same were published as the Michigan Revised Rules of Practice, and are now in active use. In his preface Mr. STEVENS sets forth succinctly the changes adopted by the new rules, as follows:

> "In proceedings at law the form of a summons has been altered so as to have it mean what it says, and advise a defendant correctly as to the time within which he must appear. The time of his appearance is made to run from the date of service upon him, in analogy to suits begun by declaration, and the period of fifteen days is allowed, respectively, for appearance, service of copy of declaration, plea, etc. The fiction of losing and finding in a declaration in trover has been abolished. All affirmative defenses are required to be set forth in a special notice. The features of inquest have been extended to undisputed open accounts. Common rules and motions may be filed with the same effect as if entered, except

as required by statute (which happens only in the case of rules to plead in suits commenced by declaration). Default absolute is abolished; the regulation of notes of issue and demands for jury is made uniform throughout the State. The rules governing service of papers on attorneys are consolidated, made uniform in law and equity proceedings, and a provision inserted allowing service by mail where the attorneys reside in the same city, village or township. The practice on the settlement of bills of exceptions is made definite and simple. In chancery causes, it is required that bills of complaint and answers be divided into numbered paragraphs; the prayer for process, as distinguished from the prayer for relief, has been made unnecessary; the time of appearance is made to run from the date of service of the subpoena; the manner of appearance has been simplified; the period of fifteen days fixed for appearance, for service of copy of bill, for answer, replication, etc., respectively. The practice on answers in the nature of cross bills, heretofore confused, has been made definite. A simple and speedy method has been provided for the taking of testimony before commissioners. To save repetition, a large number of law rules have been made applicable to chancery causes. And generally in the law and chancery rules an effort has been made to arrange them by topics, so as to place together, as far as practicable, all provisions on a given subject. It will be found that the new rules will simplify pleadings and proceedings, abolish unnecessary proceedings, prevent surprises, and materially expedite the decisions of causes."

It would seem from the provisions of the Constitution and the Statutes referred to, that authority had thereby been given to the Supreme Court to fix and determine the procedure of our courts, and that this authority is broad enough and far-reaching enough to bestow exclusive authority upon that tribunal in the matters particularly specified. This authority, however, has been very sparingly exercised. The court at all times has submitted to the expressed will of the legislature in matters of procedure, as is shown by the many cases where the question of conflict has arisen.[10]

[10] Howard v. Tomlinson, 27 Mich. 169; Wyandotte Rolling Mills v. Robinson, 34 Mich. 428; Kegel v. Schrenkheisen, 37 Mich. 174; Hurst v. Hawkins, 40 Mich. 575; Granger v. Judge of Superior Court, 44 Mich. 384; Hake v. Circuit Judge, 99 Mich. 216; Voight Brewing Co. v. Wayne Circuit Judge, 108 Mich. 356; Reid, Murdock & Co. v. Benzie Circuit Judge, 115 Mich. 418; Griffin v. Wattles, 119 Mich. 348; Ismond v. Scougale, 119 Mich. 503; Van Bernschotten v. Fales, 126 Mich. 176; Detroit, etc., R. R. Company v. Circuit Judge, 128 Mich. 497; Byrne v. Gypsum, Plaster & Stucco Co., 141

At every session of the legislature some change is made or some new method adopted relating to some phase of our procedure. Seemingly, rules of court are unimportant or not controlling to the members of that body. If a change is desired, it is made without very much, if any, regard to court rules. This may be because the court has not as yet assumed its full responsibility as contemplated by the constitutional and statutory provisions referred to. Or it may be because the court has acquiesced in the assumed paramount authority of the legislature in these matters. Whatever the cause, it is manifest to all that because of the long-continued acquiescence in this paramount authority of the legislature in such matters, notwithstanding the provisions referred to, it is quite improbable that the court can soon again assert its constitutional authority.

Our statutes are permeated with rules relative to the procedure of our courts. It would seem unnecessary to specify instances of this class of legislation. A reference to almost any topic in the index to the statutes should suffice. Take at random the subjects of—Actions, Affidavits, Amendments, Answers, Appeals, Assessment of damages, Attachments, Bail, Bills in chancery, Bills of exceptions, Books, papers, etc., Capias, Certiorari, Challenges, Courts, and the Judges thereof, Costs, Decrees, Declarations, Garnishee proceedings, Discovery, Divorce, Ejectment, Error, Evidence, Executions, Foreclosure, Forms, General issue, Judgments, Legal process, Mandamus, Notices, Orders, Partition, Depositions, Pleadings, Proceedings, Process, Production of papers, Prohibition, Publication, Referees, Set-off and recoupment, Replevin, Special verdicts, Stays, Subpoenas, Summons, Supreme Court, Transfer of causes, Trials, Verdicts, Witnesses, Writs, and many others.

Compare the great number of references to statutes with the small number of references to court rules in GREEN'S NEW PRACTICE or STACE'S CHANCERY PRACTICE, and the result will show the importance of the former over the latter in our court procedure. I apprehend that if the provisions relating to procedure were eliminated, and only those provisions relating to the substantive rights of parties retained, the present great bulk of our statutes would be very materially decreased.

Taking, then, the constitutional authority granted to our Supreme Court to "establish, modify, and amend the practice and simplify

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Mich. 62; Woodworth v. Old Second National Bank, 144 Mich. 339; Selling v. Berger, 161 Mich. 526; Mintz v. Jacobs, 163 Mich. 283; Pruner v. Detroit United Ry., 173 Mich. 149. See also, State Tax Cases, 54 Mich. 372; Brown v. Buck, 75 Mich. 274; Lee v. Buck, 101 Mich. 406; Gravel Road Co., v. Hogadone, 150 Mich. 638.

the same," and apply the legislative interpretations thereto as shown by the several statutes referred to, and we find:

1. That the Supreme Court may by rule abolish, as far as practicable, all distinctions between law and equity. How may this be done? And how far is it practicable to go? These are matters that are left to the discretion and judgment of the court. The pertinent inquiry is, What has been done in this direction by the Supreme Court since authority was first granted in 1850?

The distinction between law and equity is still rigidly maintained. Few changes have taken place. The office of chancellor was abolished before 1850. By the provision of the Constitution, the office of Master in Chancery was also abolished. For more than thirty years chancery hearings have been held in open court before the same judge who tries actions at law. There have been various minor modifications by rule and by statute, it is true, but the same rules of evidence apply and the same pleadings are required now as then. The legislature in 1887[11] sought to give the right to trial by jury in chancery cases, but the act was declared inoperative by the Supreme Court.[12]

2. It may by rule abolish all fictions and unnecessary process in proceedings. The fiction as to the lost-and-found idea in declarations in trover was retained until the adoption of the new rules in 1899. It is now abolished. I am not aware of the elimination of any substantial process or proceeding by rule of court. They remain as they formerly existed except as to the various details referred to by Mr. STEVENS already quoted.

3. The Supreme Court may by rule simplify and abbreviate pleadings and proceedings. We still have substantially the same forms of declarations on the common counts in assumpsit, trespass, trover, replevin, and case in all its variant forms, with demurrers, pleas in abatement, pleas of the general issue, with notices thereunder of special defenses when not traversed by the latter.

4. Nothing has been done, so far as I am aware, toward expediting the decisions of causes.

5. The question of costs has been left largely to the legislature. The rules of court in relation thereto conform to the statute.

6. The new code of rules remedied many imperfections, it is true, but as to abuses made possible by those rules none have been recognized to exist by the court except such flagrant violations of duty as amounted to a virtual abrogation of some rule.

7. The new rules also simplified the form of the general issue,

[11] Laws 1887, p. 358.

[12] Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

replication, and in various other minor details, corrected certain palpable imperfections in the practice; but the general requirements of the common law rules as to pleading remain substantially the same.

8. The rule relative to abatement of an action at law for non-joinder or misjoinder of parties was early adopted; but the rule as to multifariousness, as to parties or subject matter, still obtains in equity cases.

9. The rule as to amendment of process was adopted prior to 1850. The statute of amendments was passed after that date.[13] But the rule of court as to amendments applies only to such amendments as are allowable to a party without leave of court; those which must be granted by the court are governed by the provisions of the statute. The statute of amendments has been very liberally construed by the Supreme Court in many cases, and as stated by Justice CAMPBELL[14] it "is the basis of all modern relaxation of rules of procedure, and the manifest object of the statute is to give parties who are met with such objections on the trial the right of amendment on reasonable terms and to make a verdict, where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing to amend and to treat the record as if it had been actually amended." This statute has stood the test of time and remains practically as originally passed.

10. Law rule 27 provides for discontinuances against parties improperly joined, and rule 6 for joining necessary parties who have been omitted. To this extent the purpose of the 10th subdivision has been fulfilled.

With these provisions of the statutes as to the authority of the Supreme Court to make rules, taken in connection with the statute of amendments and the liberal construction given it by the court, it would seem that every conceivable proposition advocated by any one for reform in procedure, here or elsewhere, now or at any time, had been fully and completely provided for, and that the responsible source of such reforms had been pointed out. At the last session of the legislature (1913) the Governor was authorized to appoint, and pursuant to such authority did appoint, a commission to consider this question of procedural reform, which commission is to report its conclusions at the next session of the legislature. That commission is now at work, and will no doubt formulate some plan looking toward the simplification of our procedure. But I respectfully submit that the provisions of law now upon the

[13] Compiled Laws 1897, ch. 248, §§ 10268-75.

[14] Schindler v. Ry. Co., 77 Mich. 154.

statute books are amply sufficient to meet every requirement for reform, if only they are carried out. The suggestion is pertinent that, if any changes are to be made, they be made by the Supreme Court by rules, instead of encumbering the statutes further with such provisions.

As is well known, the prevailing complaint amongst the laity is that proceedings at law are too often delayed by reason of the technicalities and formalities of our procedure. It is immaterial to the onlooker or the litigant whether these delays are caused by some statutory provision or by some rule of court. That delays frequently occur must be admitted by the most earnest advocates of our present system. Conceding, as is the fact, that by both the statutes and the rules of court referred to, as they have been and are now being interpreted and applied by the courts of this State, a marked advance in procedural law has been accomplished in Michigan since 1850, and that from a comparative standpoint our practice is far more comprehensive, simple, and more speedy than the practice in almost any other state in this Union. Nevertheless, there are many other matters worthy of serious consideration which, when applied, may better our present condition.

1. One of the sources of delay is the fact that the rules permit demurrers and special pleas to be filed in pending causes whereby some question of law is raised for the determination of the court. If a pleading is defective, there is no substantial reason that can be advanced against bringing the question of law thereby raised before the court on a motion for immediate disposition. The interposition of a demurrer to a declaration or bill of complaint now means the delay of the determination of the legal question involved many weeks, possibly months. At least this is true in most trial-court jurisdictions. To substitute a motion for the special proceeding would avoid such delay. This method should also be applied in all other matters where questions of law are to be raised. A simple motion, setting forth the grounds upon which it is based, should be substituted for all other special proceedings or writs, such as certiorari, mandamus, and the like. Such a method would raise directly the questions involved so they may be heard with the least possible delay and in the simplest and most comprehensive manner.

2. The writer is also convinced that there are certain changes relative to appeals that should be made, and which, when made, will greatly facilitate such matters. We have been so long accustomed to settling bills of exceptions and chancery cases in a particular way, that any suggested change in that method is likely to be looked upon with disfavor by many members of both the bench and the bar. On

the other hand, when we consider that present methods, with only slight modifications, are substantially the same as they were a hundred years ago, we might well hesitate to join with the more conservative members of the bar in saying that no change for the better is possible. There are at least two changes that should be made:

(a) There are many reasons why the present method of settling bills of exceptions should be radically modified or entirely abolished. There is no more fruitful source of delay than this. The common practice provided by statute and rule after a cause has been heard and determined in the trial-court, is for the attorney taking an appeal to prepare a proposed bill of exceptions or case setting forth in narrative form the evidence in the case. To do this, the stenographer's minutes of the testimony must be procured. After the proposed bill of exceptions or case has been prepared and served on the opposite attorney, the latter prepares amendments thereto and the matter is then presented to the trial court to allow or reject any or all of such proposed amendments, after which the whole matter with the amendments is stenographically written out and the trial-court's signature attached thereto with the proper certificate. If stenographic copies of testimony contained only a few pages, this method might not be cumbersome; but when it is considered that in the average case the stenographer's transcript covers hundreds of pages, the difficulty and the length of time required in reviewing this testimony and setting it forth in narrative form, becomes apparent. These difficulties and the length of time required to review the proposed bill of exceptions, compare it with the original transcript and prepare amendments, are much increased when the matter gets into the hands of the appellee's attorney. After the case is settled by the court and after a delay of several months, the record is made up and printed according to a rule of the court. Briefs are then prepared and printed and the cause is in readiness for hearing by the appellate court. The pertinent inquiry is, Why should it be necessary to go through these forms and this ceremony, and take up so much time and be to such great expense in settling bills of exceptions or cases in chancery when, after it is all over, the net result is but an abbreviation of what was in existence before, namely, the testimony in the case? True, the abbreviation may reduce the bulk of the record and its printing may make it more convenient for reference, but do these advantages compensate for the great loss of time, energy, and expense in their procurement? I submit that they do not. Few cases, indeed, will justify the usual or even a very low charge by the attorney for the time actually spent in the settlement of a bill of exceptions. In such cases the

services are usually largely gratuitous. The number of points in any one case is comparatively small, and generally relate to the admission or rejection of some testimony or to the instructions or rulings of the trial court. These points can be made by a reference to the pages of the stenographer's transcript of the testimony as well and as effectively as they can be made by reference to the pages of a printed record. The particular ruling or charge complained of may be set forth in the briefs of counsel with sufficient related testimony printed therein to show the points made and whether they are sound or not. The appellate division of the Supreme Court of Judicature of England hears all such cases upon the record as made in the trial court, and the stenographer's minutes of the testimony and the files in the case constitute the record. Bills of exceptions are abolished. That court by this method has a distinct advantage over those appellate courts where the testimony given at the trial is set forth in a printed record in narrative form. Where the credibility of a witness is involved, no narrative statement of his testimony can possibly give a correct notion as to its quality or character.

In criminal appeals these suggestions are particularly pertinent. Unfortunately many trial courts have acquired the habit of permitting persons convicted to be released on bail pending an appeal to the Supreme Court. In many, if not most, cases this is a pernicious practice, although permitted by statute; for, in such case, so long as the convicted person is at liberty, there is no particular need for haste in pushing the hearing in the appellate court. When this occurs, if the cause is in readiness for hearing in the appellate court within a year after the verdict of guilty has been rendered, counsel will consider that they have proceeded with all due diligence and speed. The result is, however, that if the judgment of the trial court is affirmed a year has been lost, and if reversed and a new trial granted, the State is at a great disadvantage on the second trial; for prosecuting officers may have changed in the meantime, witnesses may have become scattered, and the general interest in the case so subsided that the chances of a conviction on a second trial are at a minimum. And this is equally true whether the convicted person is released on bail pending the appeal or not, for the time now required to go through the process of settling bills of exceptions is so unreasonably great that a new trial, if granted, is seldom successful to the prosecution. And this result is not because the case is not meritorious, but because of the great delay and the consequent weakening of the People's case in the meantime for the reasons already stated.

Again, the rights of every person so convicted may be adequately protected by the shorter method of review, namely, by transmitting the transcript of the testimony given at the trial directly to the appellate court and requiring the alleged errors to be specifically assigned as shown by such record. How cumbersome and inadequate do our present methods appear when we compare them with the expeditious methods of the English practice! Four days after the verdict of the jury in the *Crippen* case, the appellate division of the Supreme Court of Judicature was engaged in hearing on appeal the alleged errors committed by the trial court. This was made possible by the rule which permitted such hearings to be had upon the record as made in the trial court, doing away with bills of exceptions and all other proceedings, which only stand for delay rather than efficiency.

But why submit a respondent in a criminal case to the unnecessary expense of settling a bill of exceptions and printing the record before he can have his case heard on appeal? There are only a few respondents who can afford this luxury. I have in mind one case[15] where the friends of the respondent raised the necessary fund to print the record and the attorneys practically volunteered their services in the preparation of the bill of exceptions in order that the case might be taken to the Supreme Court. Otherwise the case could not have been appealed. And in another case[16] on account of the poverty of the respondent, who had been convicted of murder, the Supreme Court on application permitted a hearing to be had on the stenographer's minutes of the testimony as constituting the bill of exceptions, and the original files in the case as the record. If this can be done on application in one case, it can be made the universal method of appeal in all others.

(b) Such a method would make unnecessary writs of error and certiorari, which are but formal writs in any event and are issued as a matter of course. There is no reason why a cause should not be transmitted to the appellate court at once on the application of appellant's attorney after specifying in writing the alleged errors of the trial court and the performance of other reasonable requirements, such as the payment of fees, etc. The point is that all unnecessary and superfluous proceedings to perfect appeals should be abolished and the simplest and most direct method adopted consistent with the dignity of the situation and the due administration of justice. For it is coming more and more to be the common conception that appellate procedure should be in the nature of a rehearing and

[15] People v. Salsbury, 134 Mich. 537.
[16] People v. Sartori, 168 Mich. 308.

that final judgment, when possible, should be rendered by the appellate court. To this end the statute permitting the Supreme Court "in accordance with and for the speedy furtherance of justice in any suit, either at law or in equity, may call upon the parties to such suit, or any of them thereto, to testify orally in open court," was passed and should be used whenever possible or necessary to make its judgments final between the parties. It has been invoked to this end in at least one case.[17]

3. The statute provides, "all cases in the Supreme Court shall be decided and disposed of before or during the first week of the term next succeeding the one when the same is argued or submitted."[18] Circuit Judges in chancery cases are required to render an opinion "within six months after the same shall have been finally submitted to them."[19] On account of the constantly crowded condition of the Supreme Court calendar, the requirement of the statute above quoted oftentimes presses the Judges of that court to the limit of hardship; but I know of no reason why, under ordinary circumstances, the Circuit Judges of the State should not comply strictly with the six months' limit mentioned in the statute. Yet I have known cases to be held longer than that, and the delicacy of the situation prevents the attorneys in the case from saying very much about it. The practice should be prohibited in some substantial and effective way.

4. All terms of court should be abolished and causes should be placed on the docket for trial or hearing as soon as issue is framed. This is particularly true in those circuits where the trial courts are in almost continuous session. In less populated circuits, where there are fewer cases and terms of court last only a few days or a few weeks at a time, it is folly and a useless expense to require four terms of court each year and four separate panels of jurors to be summoned. Why not leave the matter in the hands and under the control of the presiding judge to call a jury at such time or times as may be necessary to try and dispose of all cases at issue and upon the docket ready for trial? Notices of trial and notes of issue are unnecessary and superfluous requirements, even though terms of court be continued. They too often are used to delay the trials. At each call of the calendar at the beginning of a term of court there are many questions of notice raised by the attorneys who, too often, are seeking only delay by raising such questions. Unless the rules

[17] Schroeder v. Boyce, 127 Mich. 33, note at end of case.
[18] Compiled Laws 1897, § 212.
[19] Compiled Laws 1897, § 558.

as to notice have been complied with, and the court so finds, when the question is raised, delay is inevitable.

5. Orders, judgments, and decrees of the court should take the place of all other writs, such as mandamus, injunction, execution, and the like. This change would simplify many proceedings that are now more or less complicated.

6. The question as to the absolute right to an appeal in any given case is, doubtless, a question which must be determined by legislative enactment, as it relates to a substantive right of the litigant; but to provide the manner of such appeal and the procedure in relation thereto, comes clearly within the power of the court.

Hearings in the Supreme Court should be had only on application to and leave granted by that court; and should be limited to those cases in which new questions, or questions of general importance to the state or the legal profession, are involved.

The prevailing practice in this state of indiscriminate appeals to the court of last resort has become almost a menace to the due administration of justice. So serious a charge, however, will not stand unchallenged, and merits at this time a brief analysis of the situation in justification.

An examination of the decisions reported in any one or all of the 175 volumes constituting the Michigan Reports will show that the vast majority of these cases involved no new or novel questions of law and were determined upon the application of some familiar and oft-repeated principle of the law to the facts in the particular case. It is apparent that such cases represent only the staying qualities of one of the litigants in the case to hold out to the bitter end. There are thousands of such cases printed at large in our reports, and the appellate judges are obliged, under the law, to write an opinion in each case, setting forth the facts in detail before stating their conclusions. This requirement and the consequent repetition of former rulings necessarily extend the bulk of our reports far beyond the measure of usefulness or necessity, and could be avoided by requiring leave to appeal to be first obtained. The appellate court would thereby be relieved of the unnecessary burden now imposed upon it in cases of the sort mentioned. Such a rule would enable that tribunal to confine its work to new and essential questions of law of interest to the whole people; it would give more time and greater opportunity for the investigation of these more vital questions on the part of both the members of the bar and the court; it would save thousands of dollars each year to litigants and the state, now expended in unnecessary and fruitless appeals and in the publication of hundreds of opinions that are of no particular use to any-

body; it would save to the members of the bar the necessity for buying and paying for the "dead wood" now published in the reports; it would condense the realm of research to a comparatively small number of leading cases; it would raise the standard of trial courts and result, I believe, in a more careful preparation and presentation of cases by the attorneys in and the more careful consideration of such cases by these tribunals; it would save shelf-room in every lawyer's office, which, with the multiplication of reports in our own and other states, is no inconsiderable item. Since 1872 the volumes of state and federal reports in this country alone have increased in number from 1517 to 5947. This is exclusive of the many series of reports of selected cases, digests, encyclopedias, etc., now indispensable in every lawyer's library.[20]

It has been suggested that the number of cases heard by our Supreme Court might be lessened by limiting the amount involved in appeal cases to $500. An examination of the cases in any one of our 175 volumes of reports, particularly the later ones, will show that the larger number involve less than $500; hence, such a limitation would undoubtedly have the desired effect. But the amount involved should not be made the determining question. It should be, rather, the principle involved that should control in this matter. A case having less than $100 at stake may involve a question of vital interest to the whole State, while a case having $100,000 at stake may not involve any new principle not already determined by the court in some preceding case.

That relief should be obtained from some source compatible with the due administration of justice is no longer a debatable question. Appeals only on leave first obtained will deprive no litigant of any just right to which he is now entitled. It will only bridle the license given under the present practice. Now the appellate court is not advised as to the points involved in any case brought before it until after all the money, time, and labor necessary in the settling of bills of exceptions, printing records, preparing and printing briefs have been expended. Should appeals be granted on leave only, the points involved may be raised immediately and directly by petition, and, without determining them, if they appear to be new, or otherwise worthy of further consideration, an appeal may be allowed.

In the suggestions here made we are not without precedent of the highest authority, for the Supreme Court of the United States hears only such cases on error or on appeal as come to it on leave first obtained; and the Appellate Division of the Supreme Court of

[20] 15 Law Notes, 125.

Judicature of England and several of her colonies pursue the same method.

Litigation should end somewhere. As a general rule trial courts pass finally upon the great bulk of litigation brought before them. Not over ten per cent of the cases there tried are carried to the appellate court, and in the greater number of these cases the determination of the trial court is affirmed. What has the litigant gained by an appeal in such a case? A substantial loss, however, has accrued to the State to maintain the machinery whereby a warring litigant has been enabled to carry the game one step further, to say nothing of the added expense and delay occasioned his opponent in securing those rights to which he was entitled in the beginning. The only justification for the present practice is found in the comparatively small number of cases reversed by the appellate tribunal. And many of these cases, in the last analysis, will be found to involve no new or novel questions of law or practice, and are of interest only to the parties immediately and directly involved.

Any or all of the changes here proposed could be made without sacrificing the fundamental principles of our practice or of the substantive rights of parties.

At least, I am convinced that, on a careful consideration of many of the methods now prevailing, it will be found that some of them can be either modified, entirely eliminated, or other and simpler methods adopted in their place that will hasten the progress of trials and lessen the expense of litigation to both the litigant and the state.

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